No. 94-859

(13)

Supreme Court, U.S.
FILED
MAR 24 1995
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

BRUCE BABBITT, Secretary of the United States Department of the Interior, *et al.*, *Petitioners*,

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, *et al.*, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* STATE OF TEXAS IN SUPPORT OF AFFIRMANCE

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INTERESTS OF AMICUS CURIAE STATE OF TEXAS

This brief is submitted by *amicus curiae* State of Texas ("Texas") on behalf of the state, its local governments, and the private groups that have endorsed this brief.[1] It is also submitted by Texas in its capacity as *parens patriae* in order to protect the self-governing and private property rights of Texas citizens. Texas and the members of the private groups endorsing this brief are affected by the *de facto* comprehensive resource management scheme contrived by the Petitioners on the basis of their overexpansive interpretation of the term "harm" (and therefore "take") as contained in the Endangered Species Act ("ESA").[2] This scheme will convert substantial amounts of private property and state property into *de facto* "federal wildlife preserves," the onus of which may be avoided only by securing an ESA § 10(a) "incidental take" permit.

Texas and its political subdivisions seek to vindicate and protect fundamental, historical attributes of state sovereignty and self-government, including their police power to make and enforce laws to protect their citizens' health, safety, and property against the intrusion of the United States Fish and Wildlife Service ("FWS").[3]

SUMMARY OF ARGUMENT

I. Deference to FWS's "harm" regulation pursuant to the step 2 analysis of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) is inappropriate because the challenged agency regulation intrudes into areas of constitutionally-protected state authority without a plain statement from Congress. The intrusion results in derogation of Texas' and its citizens' self-governing and property rights.

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[1] The list of the private groups who have endorsed this brief is included in the Appendix at 1a.

[2] 16 U.S.C. §§ 1531-1544.

[3] Because Petitioner Secretary of the Interior has delegated his ESA authority to the FWS, Texas will refer to Petitioners collectively as "Petitioners" or "FWS."

When Congress desires to intrude into areas of state sovereignty or authority, it must do so plainly, with unmistakably clear language in the text of a statute. Agency regulations which intrude on a state's and its citizens' self-governing and property rights must be measured against that stringent standard. Any less stringent standard (such as the application of the step two analysis of *Chevron*) would allow Congress and federal agencies to circumvent the protections afforded the states by the "plain statement rule." Furthermore, it is a fundamental principle of statutory construction that constitutional questions should be avoided when possible.

The Tenth Amendment, the Guarantee Clause, and the inherent structure of the Constitution protect the self-governing rights and sovereignty of states. These rights ultimately devolve to the citizens of the state in order to protect them from overreaching by the federal government. Pursuant to their self-governing rights, Texas and its citizens have established a legal framework defining property rights and the powers of state and local governments to regulate and manage resources. The ESA's language and legislative history do not indicate that Congress intended to interfere (to the extent sought by FWS) with states' land use planning and water rights.

II. The FWS "harm" regulation intrudes into two deeply-rooted areas reserved to the states and protected by the Constitution: the control, allocation, and use of water resources and land use management (including protection of private property). FWS's overexpansive interpretation of the word "harm" results in a *de facto* comprehensive resource management scheme in Texas that is extensive, undefined, unpredictable, and expensive. As a result, landowners use their land at the risk of civil and criminal sanctions.

Using the overexpansive "harm" regulation, the FWS has not only run roughshod over long-established Texas water law and property law, it has seized control over land use planning throughout large sections of the state from Texas and its local governments.

Conclusion

FWS's definition of "harm" is *ultra vires* because it fails the step one analysis of *Chevron*. It is furthermore *ultra vires* because Congress did not plainly state that FWS was authorized to infringe upon important areas of state governmental and sovereignty rights and because the interpretation needlessly raises constitutional issues by infringing on the rights and powers of Texas and its citizens protected and reserved by the Tenth Amendment, the Guarantee Clause, and the inherent structure of the Constitution. The Court of Appeals' decision should be affirmed.

ARGUMENT

The Endangered Species Act ("ESA")[4] makes it unlawful for any person to "take" an endangered species. 16 U.S.C. § 1538(a)(1). A "take" is defined by statute to include "harm." There is no statutory definition of "harm." By regulation, however, FWS has defined "harm" as follows:

> "Harm" in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

50 C.F.R. § 17.3 (1994).

On the basis of this overexpansive interpretation of "harm," FWS has contrived a *de facto* comprehensive resource management scheme in Texas that prevents Texas and its landowners from using their land, property, and resources in ordinary, customary ways (such as building homes and pumping groundwater) in accordance with state and local law.

As a result of the FWS's "harm" regulation, Danny McFadin, a Uvalde County farmer, must decide either to stop pumping Edwards Aquifer water necessary to irrigate his crops or to continue to pump the water and risk fines and jail for "takes" of endangered species. Remarkably, the endangered species at issue are not on his land. Rather, the protected species live in springs

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[4] 16 U.S.C. § 1531 *et seq.*

over 100 miles away. Hundreds of other farmers and dozens of cities in Central Texas face the same dilemma. San Antonio, for example, pumps all of its water from the Edwards Aquifer. San Antonio is now challenged with ensuring the long term delivery of water to its residents for residential, business, economic development, and other essential uses.

A federal district court adopting the FWS's view of "harm" has threatened to impose pumping limits on San Antonio and the irrigators unless they or Texas does so first.[5] Despite Texas's legislative efforts, including the creation of a new "Edwards Aquifer Authority" ("EAA"), the court remains unsatisfied and is apparently ready to federalize the Edwards Aquifer or eviscerate Texas' groundwater law in order to impose pumping limitations. According to the mayor of San Antonio, the effect of such limitations would "stick a dagger in the economic heart of the community."[6]

Not even national security or the readiness of the nation's armed forces stationed in Central Texas are immune from the reach of the ESA theory embraced in the Edwards Aquifer case. The Department of Air Force is confronted at Kelly Air Force Base (located in San Antonio) with the same problem facing Mr. McFadin. Whether the base is closed or whether activities can be expanded depends now on whether there will be sufficient water in the event pumping is limited from the aquifer.[7]

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[5] *Sierra Club v. Babbitt*, No. MO-91-CA 069 (W.D. Tex. May 26, 1993) (amended order) ("*Sierra Club I*"). The court relied heavily upon testimony by a FWS official to the effect (1) there were "takes" as a matter of fact and as a matter of administrative interpretation of the ESA, and (2) the Texas legislative session ending May 1993 represented the "last chance" for the legislature to solve the supposed "take" problem before the "blunt axes" of the ESA would have to be dropped on Texas. *Id.* Amended Findings of Fact and Conclusions of Law ¶ 161(May 26, 1993).

[6] "Fed hearing on species act brings out anger in Boerne [Texas]," *San Antonio Express News*, March 21, 1995, at 1 (statement of Nelson Wolff, Mayor of San Antonio).

[7] Texas is concerned about the growing interpenetration between ESA §§ 7 and 9 as applied by the FWS. If the FWS cannot use its overexpansive interpretation of "harm" pursuant to ESA § 9 to directly reach activity on private land (such as the pumping of groundwater or the clearing of cedar trees) that it believes is "harming" a listed species, then it will attempt to

Margaret Rodgers, who owns land in Travis County, has received letters from the FWS informing her that clearing her land to build a fence may "take" an endangered species--the golden-cheeked warbler. The letters stated that she could be subject to a fine of up to $50,000 and imprisonment up to one year. Understandably, she stopped trying to build the fence. The letters did not accuse her of killing or injuring a warbler; in fact, they did not even say that any warblers live, or have ever been seen, on her property--the mere clearing of her land was sufficient reason to prompt the FWS to send its letters. Hundreds of other landowners in Texas are in Mrs. Rodgers' predicament.

Mr. McFadin and Mrs. Rodgers at least have notice that they risk civil and criminal penalties in using their land. But because FWS does not make clear the extent of its resource management program, other Texas landowners and governmental entities are unaware that they are also subject to penalties for making ordinary use of their land.

I. STEP TWO OF THE CHEVRON STANDARD--"DEFERENCE TO ADMINISTRATIVE INTERPRETATION"--IS AN INADEQUATE STANDARD OF REVIEW BECAUSE THE CHALLENGED FWS REGULATION SUBSTANTIALLY ALTERS THE TRADITIONAL STATE/FEDERAL BALANCE.

Petitioners argue that the Court should review the FWS "harm" regulation under the two-step analysis set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *Petitioners' Brief* at 20. Step one of the *Chevron* analysis determines whether "Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to unambiguously expressed intent of Congress." 467 U.S. at 842-843. Texas agrees with the Court of Appeals and Respondents that the FWS

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increase its efforts to control those supposed harmful activities indirectly through forced consultation with a federal agency (pursuant to ESA § 7) having *some* federal program delivery nexus with the landowner. For example, in the Edwards Aquifer situation, the FWS could pressure the Farmers Home Administration through the ESA § 7 consultation process to refrain from making or guaranteeing loans to farmers seeking financing for farming activities which depend on the pumping of aquifer water.

"harm" regulation fails step one of the *Chevron* test and is *ultra vires*.[8]

Petitioners argue, nonetheless, that if the Court finds the ESA silent or ambiguous regarding the issue of whether habitat modification by itself constitutes a "take," then it should apply step two of the *Chevron* analysis and give "substantial deference" to FWS's interpretation. *Petitioners' Brief* at 16. Texas disagrees. While *Chevron's* "deference to agency interpretation" of an ambiguous statutory term may provide a proper standard for conventional review of a regulation, it is inadequate for reviewing a regulation which deeply intrudes into traditional state authority and upsets the appropriate balance between federal and state governments.

The *prudential* presumption of judicial "deference to the administrative agency" must yield to giving greater weight to *constitutional* concerns regarding federalism and dual sovereignty when a federal agency intrudes into areas reserved to the states. In such cases, the Court should more closely scrutinize the agency regulation to ensure that Congress clearly and unambiguously intended the intrusion. Thus, a heightened standard of review--"*Chevron* Step Two-Plus"--for the FWS "harm" regulation should be adopted by the Court because fundamental doctrines of federalism and the self-governing rights, powers, and duties of states and local governments are at stake.

A. THE PLAIN STATEMENT RULE.

In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the Court articulated the "plain statement rule" with respect to determining whether Congress intended to override state self-governing rights and powers. "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States." *Gregory*, 501 U.S. at 461 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). To make its intention clear and manifest, Congress must be "unmistakably clear in the language of the statute." *Id.* at 460-

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[8] Texas supports the Court of Appeals' ruling and the Respondents' position in this regard. Texas will limit its brief to federalism-based issues because the conventional *Chevron* analysis issues are being briefed by the parties to this case.

461 (citing *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)). "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461.

The plain statement rule, furthermore, ensures that when an interpretation of a statute would "upset the usual constitutional balance of federal and state powers, . . . it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance." *Id.* at 460 (citation and quotation marks omitted). This rule rests on the understanding that while "Congress may legislate in areas traditionally regulated by the States," the power to do so is "an extraordinary power in a federalist system," which courts "must assume that Congress does not exercise lightly." *Id.* at 460.[9]

B. Constitutional Issues Should Be Avoided Where Possible.

It is axiomatic, when reviewing whether a regulation is *ultra vires*, that constitutional issues--including the preservation and maintenance of the constitutionally appropriate state/federal balance--should be avoided when an otherwise acceptable construction of a statutory provision is possible.[10] The FWS's overexpansive interpretation of "harm" raises serious constitutional issues which can be avoided through a narrower and more appropriate construction of the word "harm"--such as that construction adopted by the court of appeals in this case.

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[9] *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947): "[T]he historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress."

[10] "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *New York v. United States*, 112 S.Ct. 2408, 2408 (1992).

C. THE CONSTITUTIONAL ISSUES: STATE SOVEREIGNTY AND SELF-GOVERNMENT.

The proper balance between the federal government and the states is preserved textually by the Tenth Amendment[11] and the Guarantee Clause,[12] and is embedded in the inherent structure of the Constitution.[13] As declared in *Texas v. White,* 7 Wall. 700, 725 (1869):

> [T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

By constituting a federal government of limited powers, while reserving "the powers not delegated to the United States, nor prohibited by it" to the states and the people, the Constitution established a framework in which the states retained "substantial sovereign authority." *Gregory v. Ashcroft,* 501 U.S. 452, 457 (1991).[14] If the states or the people have not conferred a power upon Congress, then *a fortiori* a federal agency cannot assume that power in derogation of the Tenth Amendment.

The Guarantee Clause is predicated on the proposition that state governments are accountable to their citizens with respect

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[11] U.S. CONST. amend. X (the "Tenth Amendment"): "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[12] U.S. CONST. art. IV, § 4 (the "Guarantee Clause"): "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."

[13] *See, Nevada v. Hall,* 440 U.S. 410, 433 (1979) (Rehnquist, J., joined by Burger, C.J., dissenting).

[14] In *New York,* 112 S.Ct. at 2417 (1992), the Court stated:

> If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

to fundamental decisions about how to allocate, control, and use resources and define property rights.[15] A state's "republican form" of government is diminished when its ability to make decisions is fettered, constrained, or overridden by a federal agency acting *ultra vires*.[16] The vitality of the Guarantee Clause was renewed in *New York v. United States*, 112 S.Ct 2408, 2432-2433 (1992) in which the Court acknowledged the suitability of the Guarantee Clause to protect states from an over-intrusive federal government.[17]

The control of elected officials by the electorate and their accountability to the citizens who entrust them to office is the *sine qua non* of a republican form of government.[18] "Since at least the eighteenth century, political thinkers have stressed that a republican government is one in which the people control their

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[15] *See Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 762 (1982) ("*FERC*").

[16] Of course, pursuant to the Supremacy Clause and assuming a basis for exercising a power (*e.g.*, the Commerce Clause or the Spending Clause), Congress can intrude into state sovereignty and override state law. The requirement, however, is that Congress must plainly state that it intends to do so.

[17] In *New York*, the Court ruled that the Low-Level Radioactive Waste Policy Act did not violate the Guarantee Clause because under the Act "[t]he States . . . retain the ability to set their legislative agendas; state government officials remain accountable to the local electorate." *New York*, 112 S.Ct. at 2433.

[18] Professor Tribe has strongly urged the revitalization of the Guarantee Clause's protection of state governments:

> *[The Guarantee Clause] might plausibly be invoked in support of the proposition that the Constitution recognizes in the National Government a duty, running directly "to every State in this Union" rather than to individuals, to respect the state's most fundamental structural choices as to how its people are to participate in their own governance* . . . When Justice O'Connor observed, in her powerful dissent in [*FERC*], that "federalism enhances the opportunity of all citizens to participate in representative government," [456 U.S. at 789.] . . . she may have hit upon an important link between the tacit postulate of state sovereignty and the textual guarantee of republican government.

Laurence Tribe, AMERICAN CONSTITUTIONAL LAW 397-398 (2d. ed. 1988) (emphasis added).

rulers [citing J. Locke, *Second Treatise of Government*, § 149]."[19]

Preserving state sovereignty and federalism is not, however, an abstract "states' right" goal. Rather the Court has recognized that such preservation is critical to protecting the rights and powers of citizens. As the Court stated in *New York*, 112 S.Ct. at 2431 (citations and quotation marks omitted):

> The Constitution does not protect the sovereignty of the States . . . as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself. Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power . . . [A] healthy balance of power between the States and the federal government will reduce the risk of tyranny and abuse from either front.

Reflective of the citizens' rights, values, desires, and concerns, Texas and its local governments have erected a system of laws which defines and protects the property of their citizens and have established a comprehensive resource management system, including land using planning, zoning, environmental protection, resource protection, and water rights protection, control, and allocation. This system has been diminished by the FWS and its overexpansive interpretation of "harm."

The hobbling of a state government's abilities to protect the property and self-governing rights of its citizens results in a diminishment of the state's republican form of government.

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[19] Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 23 (1988) (hereinafter "*Guarantee Clause and State Autonomy*"), citing The Federalist No. 39 (James Madison). In *New York*, the Court relied on Professor Merritt's article for the following proposition: "Accountability [of state officials to the public] is . . . diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." 112 S.Ct. at 2424.

Federal abrogation, furthermore, of a state's property protection and regulatory framework constitutes a violation of the Guarantee Clause--unless Congress clearly intended to supersede the state's laws.[20] Without clear and manifest intention by Congress, a federal agency cannot convert a sovereign state into a mere subordinate "field office" of the federal government. *See New York* 112 S.Ct at 2434.

D. The Language And Legislative History of the ESA Clearly Indicate That Congress Deferred to State Law in Areas Constitutionally Reserved to the States.

As originally passed, the ESA was very deferential to the states, apparently due to the constitutional concerns identified above and the historic pre-eminence of state law in regulating wildlife, natural resource management, and private land use. Congressional deference is manifested in ESA §§ 4(d), 6(c)(1)(E)(ii), and 6(g)(2)(B), which make state law controlling in many instances in determining when a "take" of a listed wildlife species has occurred. The FWS's view that the ESA, through the simple inclusion of the word "harm," allows FWS to regulate land use and displace state authority is incompatible with this Congressional deference to state law.

Moreover, there are strong indications in the legislative history of the ESA that Congress chose not to displace state authority in the area of regulating private land use. Senator Williams' bill, as introduced, defined "take" to include the "destruction, modification, or curtailment of [a listed species']

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[20] Professor Merritt explained:

> [T]he words of the guarantee clause suggest a limit on the power of the federal government to infringe state autonomy: the citizens of a state cannot operate a republican government, "choos[ing] their own officials" and "enact[ing] their own laws," if their government is beholden to Washington. [The Guarantee Clause], therefore, may be read as a promise to preserve the state autonomy necessary to foster republican government.

Guarantee Clause and State Autonomy at 25.

habitat or range."[21] The Senate Committee (when it reported S. 1983) deleted the "habitat modification" language entirely.[22] The Senate Report accompanying S. 1983 stressed that the states have the lead "in protecting domestically endangered species," with the federal roles largely being to appropriate funds "to acquire lands" and support the states.[23] Thus, it appears that the Senate deleted the "habitat modification" language out of respect for state regulatory authority over private land uses. More particularly, Congress' intent with respect to deferring to states with respect to water issues is abundantly clear:

> It is further declared to be the policy of Congress that Federal Agencies shall cooperate with State and Local Agencies to resolve water issues in concert with conservation of endangered species.

16 U.S.C. § 1531(c)(2).[24]

II. THE FWS'S "HARM" REGULATION INTRUDES INTO TWO PRINCIPAL AREAS OF TRADITIONAL STATE AUTHORITY: THE CONTROL, ALLOCATION, AND USE OF WATER RESOURCES, AND LAND USE PLANNING.

Under the federal system established by the Constitution, state and local governments enact, maintain, and enforce laws

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[21] *Endangered Species Act of 1973: Hearings on S. 1592 and S. 1983 Before the Subcomm. on Environment of the Senate Comm. on Commerce,* 93d Cong., 1st Sess. 27 (1973) ("1973 Senate Hearings").

[22] The reported version defined "take" as "harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct," much as the ESA does today. S. Rep. No. 307, 93d Cong., 1st Sess. 14 (1973). "Harm" was added as part of a package of undebated Senate floor amendments.

[23] S. Rep. No. 307 at 2-5, *reprinted in* 1973 U.S.C.C.A.N. 2991-93.

[24] Congressional concern for states is further exemplified in ESA § 11(g)(1)(A), 16 U.S.C. § 1540(g)(1)(A). This provision does not allow a citizen suit to be brought against a state in violation of the Eleventh Amendment. *See Blatchford v. Native Village of Noatak,* S.Ct. 2578, 2584-2585 (1991); *Dellmuth v. Muth,* 491 U.S. 223, 227-228 (1989). In *Hess v. Port Authority Trans Hudson Corporation,* 115 S.Ct. 394, 400 (1994), the Court recognized that "current Eleventh Amendment jurisprudence emphasizes the integrity retained by each state in our federal system . . . ."

protecting private property. "'Property interests, of course, are not created by the Constitution, but rather by existing rules or understandings that stem from an independent source such as state law." *Delaware v. New York*, 113 S. Ct. 1550, 1557 (1993) (citation and quotation marks omitted). Real property law, furthermore, has been recognized by the Court as a matter of special concern to the states. *Fidelity Federal Savings. & Loan Association v. de la Cuesta*, 458 U.S. 141, 153 (1982).

Certain police powers are reserved to the states and protected by the Constitution. State and local governments are particularly responsible and entitled to enact, maintain, and enforce laws governing the use of land and water, such as laws regarding zoning,[25] land use planning,[26] and natural resource management.[27]

The "harm" regulation substantially intrudes into two areas in which Congress and the courts have consistently and pointedly deferred to state law: resource management (including the definition, protection, use, and control of private property), and the use, control, and allocation of water. Paradoxically, the result of FWS's overexpansive interpretation of "harm" is that the mere listing of species results in a resource management system controlled by a cadre of federal bureaucrats, scientists, and technicians--without any necessity to designate critical habitat as the ESA requires.[28]

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[25] "[Z]oning laws and their provisions . . . are peculiarly within the province of state and local legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 509 n. 18 (1975).

[26] *See Dolan v. City of Tigard*, 114 S.Ct. 2309, 2317 (1994). *See also, California Coastal Commission v. Granite Rock Company*, 107 S.Ct. 1419, 1431 (1987) (state land use planning law applicable to federal land).

[27] With respect to state authority over resources in general, *see Sporhouse v. Nebraska ex rel. Douglas*, 458 U.S. 963, 964 (1982) (Rehnquist, J., joined by O'Conner, J. dissenting) (states have traditional authority over resources within their respective boundaries which are essential to the lives and well-being of their respective citizens). With respect to deference to state water law, *see* Section II.A. *infra*. With respect to wildlife protection, *see* Section I.D. *supra*. *See also, Toomer v. Witsell*, 334 U.S. 385, 402 (1948).

[28] FWS Director Molly Beattie publicly stated, with respect to the designation of critical habitat for a protected species, the protected golden-cheeked warbler, "[t]he critical-habitat designation doesn't add anything to

A. THE FWS "HARM" REGULATION UPSETS THE STATE/FEDERAL BALANCE BY INTRUDING INTO STATE WATER LAW.

Water law--the determination of allocation, ownership, and control of water resources--has long been established as an area of traditional state authority and has long received extraordinary deference from both Congress and the courts. *California v. United States,* 438 U.S. 645, 653 (1978). Congress has oftentimes preserved the states' right to determine which systems of law to follow. *Id.* at 658.

Texas follows the "rule of capture" for groundwater. *Houston & T.C. Railway Co. v. East*, 81 S.W. 279 (Tex. 1904). The rule of capture has several important implications pertaining to this case. First, it means groundwater is the private property of the surface owner subject to the surface owner's "capture" of the resource. Second, it is a rule of no liability.[29] Third, the rule of no liability extends to groundwater pumping that affects springflow relied upon by surface appropriators.[30]

The case for federal deference to state water law is even stronger in Texas than in other western states. Federal lands do not comprise a large percentage of property owned in Texas. More than 96 percent of the land in Texas is privately owned. Furthermore, Texas has few of the massive federal water projects that have been the source of so much of the Supreme Court's jurisprudence in the area of water.

The following are examples of how the FWS "harm" regulation is being applied to displace long-standing Texas water law. These applications unavoidably infringe upon private property rights protected by Texas' property law framework, and

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cheeked warbler, "[t]he critical-habitat designation doesn't add anything to the constraints on the average landowner." "Agency defends plan for songbird habitat," *San Antonio Express News,* July 27, 1994, at 1.

[29] That is, adjoining landowners do not have a cause of action for damages or injunction resulting from the pumping of underground water. *See e.g., City of Sherman v. Public Utility Commission*, 643 S.W.2d 681 (Tex. 1983).

[30] *Pecos County WCID v. Williams,* 271 S.W.2d 503 (Tex. Civ. App.--El Paso 1954, *writ ref'd n.r.e.*).

also infringe on Texas' self-governmental rights to determine how its water resources will be allocated, controlled, and used.

1. The Edwards Aquifer: Federal Regulation of State Water Law Through the "Harm" Definition.

Sierra Club v. Babbitt,[31] currently before the federal court in the Western District of Texas represents an effort to impose federal regulation pursuant to the ESA over pumping in the *entire* Edwards Aquifer region of Central Texas.[32] The district court held that when springflows at the Comal and San Marcos Springs fed by the Aquifer drop below a specific rate, endangered fountain darters are "taken" in violation of ESA § 9.[33]

The court has threatened several times to impose pumping limits on the Edwards Aquifer unless Texas develops a regulatory system to limit pumping to whatever extent is necessary to avoid "takes," even in a repeat of the drought of record.[34] Most recently, on March 6, 1995, the court stated that it "has no alternative under the law [the ESA] but to do whatever is necessary to keep the Comal and San Marcos springs flowing."[35] The court further indicated that it believes that it has the authority to order Texas to implement a pumping reduction plan adopted by the court, and that it will do so, should Texas fail to do so on its own.

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[31] *Sierra Club v. Babbitt*, No. MO-91-CA 069 (W.D. Tex. May 26, 1993) (amended order) ("*Sierra Club I*").

[32] The Edwards Aquifer, which extends over 3600 square miles in six counties in Central Texas, feeds the San Marcos and Comal Springs ("Springs"), where the fountain darter and four other listed species are found. *Sierra Club v. Babbitt,* 995 F.2d 571, 573 (5th Cir. 1993) ("*Sierra Club II*"); *Sierra Club I*, Amended Findings of Fact and Conclusions of Law ¶¶ 5, 24, 25.

[33] *Sierra Club I,* Amended Findings of Fact and Conclusions of Law ¶ 81. According to the Fifth Circuit, the FWS was found guilty of the "takes." *Sierra Club II,* 995 F.2d at 574.

[34] The plan must also limit pumping to whatever extent is necessary to avoid any appreciable reduction in the likelihood of the species' survival and recovery and any appreciable diminution of the value of critical habitat for the survival and recovery of any listed species. *Sierra Club I,* at 6 (W.D. Tex. May 26, 1993) (amended order).

[35] *Sierra Club I*, Order on the Sierra Club's Second Motion for Additional Relief, at 2, 8 (W.D. Tex. March 16, 1995).

In response to the court's 1993 "urgings" and in order to avoid the FWS "blunt axes," the Texas legislature created the Edwards Aquifer Authority ("EAA") in 1993 to manage the Edwards Aquifer. Because the implementation of the act creating the EAA was objected to under Section 5 of the Voting Rights Act, the federal court appointed a monitor in February 1994[36] to gather and evaluate "information necessary to allow the court to take appropriate action to prevent violations of the [ESA]."

This application of the "harm" regulation in the Edwards Aquifer litigation has sweeping ramifications. It has the potential to negate an entire body of Texas groundwater law, to eviscerate the authority of several local groundwater conservation and regulatory bodies, and erode the vested property rights of those individuals who must rely on the Edwards Aquifer for water to drink, irrigate crops, or run businesses. As noted above, Texas follows the rule of capture with respect to groundwater. By holding that groundwater pumping causes a "take" under ESA § 9, the *Sierra Club* court possibly subjects the pumpers (in addition to the FWS) to civil and criminal liability for the very same act that, under Texas law, is not only legal, but falls under a private property rule of no liability. *See City of Sherman v. Public Utility Commission,* 643 S.W.2d 681 (Tex. 1983); *Pecos County WCID v. Williams,* 271 S.W.2d 503 (Tex. Civ. App. - El Paso 1954, *writ ref'd n.r.e.*) (no liability for landowners whose pumping of underground water affected flow of spring relied on by adjacent landowner).

The potential reach of the "harm" regulation over water use and land regulation in this case is truly astonishing.[37] The

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[36] *Sierra Club I,* Order Appointing Joe G. Moore, Jr. as Monitor, at 1-2 (W.D. Tex. Feb. 25, 1994).

[37] The American Bar Association's Section of Natural Resources, Energy, and Environmental Law Journal stated moreover:

> [T]he *Sierra Club* suit presents a situation in which the connection between the activity and the taking [under the ESA] is extremely remote. The suit literally would have FWS regulate groundwater withdrawal by an irrigator based on conditions at a spring located almost one hundred miles away from that irrigator's activity. Moreover, the irrigator's activity alone is not what is causing those conditions at the spring to occur, but rather it is the cumulative effect of a regionwide activity. That activity is not associated with direct destruction of habitat;

Edwards Aquifer is the major source of water for over one million people: It supplies water to San Antonio and other cities, as well as to farmers, ranchers, businesses, and military installations.[38] These individuals, businesses, and cities must either decide to stop pumping water, at great cost and political detriment to themselves, or face civil and criminal sanctions in the future.[39]

The threat of a court-run regulatory system is increasing. Under the FWS interpretation of "harm," FWS and the court have the authority to impose restrictions on private and public property immediately, rather than continuing to press Texas to do it for them. In addition, the FWS could bring a civil or criminal action,

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rather, it is the result of the general sheltering and welfare of a regional population (*i.e.*, the supply of water to residences and businesses).

If the ESA was intended to cover natural resource management issues such as those raised in the Sierra Club lawsuit, one has to question what situations the ESA could not cover. For example, if it could be shown that acid rain in northeastern forests resulting from midwest power plant production is resulting in the depletion of endangered species habitat, could FWS regulate power plant practices? . . . Another scenario might involve an interstate water dispute in which one state argues that an upstream state is diverting so much water that an endangered species' habitat is threatened. One's mind does not have to wander far to come up with similar examples of how FWS could use the ESA as a resource management tool on a regional or even national scale.

"Phase Three of the ESA: Using Endangered Species Protection as a Natural Resource Management Tool," NATURAL RESOURCES & ENVIRONMENT JOURNAL, Winter 1992, at 39 (emphasis added).

[38] *Sierra Club I*, Findings of Fact and Conclusions of Law ¶¶ 16, 17.

[39] Texas agrees with the arguments made by the State of Arizona in its amicus brief that the FWS "harm" regulation is constitutionally suspect as an overbroad construction of a criminal statute in that it criminalizes lawful land uses on nonfederal lands. Therefore, Texas supports Arizona in its analysis that traditional insistence on clear statutory statements by Congress is a prerequisite to criminalization of ordinary activities. The Edward Aquifer case indicates the problems of an overly broad interpretation of "harm": it is unclear which of the thousands of pumpers of the Edwards Aquifer would be criminally culpable for the purported "takes" of the fountain darter, or upon what principled basis a court could convict, or the federal government could prosecute pumpers throughout the entire Edwards Aquifer region.

or the Sierra Club could bring a citizen suit, against those who are pumping water from the Aquifer.

2. PROPOSED LISTING OF THE BARTON SPRINGS SALAMANDER AND THE ARKANSAS RIVER SHINER: FURTHER FWS PLANS TO MANAGE STATE WATERS.

A 1994 FWS proposal to list the Barton Springs salamander as endangered stated that designating Barton Springs (the only place the salamander is found) as critical habitat "would actually be detrimental to conservation efforts . . . because it would promote the misconception that the Barton Springs are the only areas important to the conservation of the species."[40] The springs are fed by an aquifer, and the FWS believes that it has the authority to regulate activities--primarily urban development[41]--that might affect the quality and amount of the water in the aquifer. The area of land that provides water to the aquifer that feeds the Barton Springs is 354 square miles.[42]

On August 3, 1994, the FWS proposed to list the Arkansas River shiner (a fish) as an endangered species.[43] In that proposal, the FWS implied that groundwater uses in three states would have to be modified to preserve the species.[44] The FWS recognized that groundwater is an extremely important source of water in Texas, Kansas, and Oklahoma. FWS noted that withdrawals of groundwater in the Canadian River Basin in Texas were as much as thirty-three times higher than the annual natural recharge in 1980.[45] The FWS concluded that under current conditions of groundwater usage, suitable habitat to support Arkansas River shiner populations is nonexistent. In other words, the FWS declared that those three states would have to reform current water usage. Drastic changes to surface water uses would also be demanded by the FWS.

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[40] 59 Fed. Reg. 7968, 7977 (Feb. 17, 1994).

[41] *Id.* at 7971, 7977.

[42] *Id.* at 7969.

[43] 59 Fed. Reg. 39532.

[44] *Id* at 39535.

[45] *Id.*

C. THE FWS OVEREXPANSIVE DEFINITION OF "HARM" RESULTS IN FEDERAL LAND USE REGULATION THAT EFFECTIVELY PREEMPTS STATE AND LOCAL LAND USE PLANNING.

The FWS's overexpansive interpretation of the word "harm" is producing an unprecedented shift in resource management power from the states and local governments to an unelected and unresponsive federal bureaucracy. FWS rests its resource management scheme on the word "harm." This term was added by a technical amendment to the ESA in 1982, without debate. It is inconceivable that so innocuous an addition could justify the pervasive resource management scheme spawned by FWS's "harm" definition.

Pursuant to its interpretation of "harm," FWS has acted to regulate state and private land in Texas. In particular, it prohibits landowners from undertaking ordinary, otherwise legal activities not directed against endangered or threatened species. This prohibition is extensive--it affects land in almost all of Texas' 254 counties.

It is impossible for landowners to know the full *geographical extent* of the prohibition, however, because FWS rarely delineates the habitat of listed species. Moreover, FWS does not limit its oversight to land that contains habitat, delineated or not; it relies on its regulatory definition to restrict land use hundreds of miles away from habitat, on occasion, if it feels that use of that land might--however indirectly--affect protected habitat.

Nor is it possible to predict what *kinds of uses* of land are prohibited. Under its interpretation of "harm," FWS need not show that a land use actually results in physical injury to an individual member of a species; to the FWS, the modification of habitat is itself enough to demonstrate that a "take" has occurred. The regulatory definition of "harm" presumes that proscribed injury to wildlife may occur by any activity that "significantly impair[s] essential behavioral patterns." 50 C.F.R. § 17.3. Only FWS, however, knows what habitat modifications are "significant" enough to come under that prohibition. It is clear, moreover, that FWS's interpretation of "harm" does not require any showing of actual death or injury to an individual of a listed species, despite protestations on brief by FWS that it does.

As a result, landowners use their land at the risk of possible civil and criminal sanctions under the ESA. Their only recourse is to seek an "incidental take" permit from FWS under ESA § 10(a). Such permits are rare, seldom available to individuals, and often very expensive.

This system of prohibitions and permits amounts to a pervasive land regulation program not contemplated by Congress in passing the ESA. Congress has provided for a system--ESA § 5 federal land purchases--that would pay landowners for their land if necessary to protect listed species. FWS has reversed that system, by requiring landowners to pay for the use of their own land. The FWS potentially unbounded regulation of land use based on the word "harm" is contrary to the intent of Congress and raises serious constitutional and federalism issues.

1. The FWS Land Use Regulation System Applies To Land Throughout Texas and, for the Most Part, Its Boundaries Are Undefined.

FWS has listed 42 species of fish and wildlife as endangered or threatened whose habitat is at least in part within Texas.[46] FWS has proposed listing another four species of fish and wildlife in Texas,[47] and it has identified another eleven for which it believes it has sufficient information to support such a proposal.[48] FWS has many more listings under consideration: It is considering another 155 species in Texas for which it has

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[46] *See* FWS, *Threatened and Endangered Species of Texas* (1992). FWS regulations list another four species in Texas: the Louisiana black bear, the Mexican spotted owl, the Coffin Cave mold beetle, and the Bone Cave harvestman. 50 C.F.R. § 17.11, at 93,105,120,121 (1994). FWS added the southwestern willow flycatcher to the list of endangered species on February 27, 1995. 60 Fed. Reg. 10693.

[47] *See* 59 Fed. Reg. 7968 (Feb. 17, 1994) (proposal to list Barton Springs salamander as endangered); 59 Fed. Reg. 35674 (July 13, 1994) (proposal to list jaguar, which does not currently live in Texas but may cross border from Mexico, as endangered); 59 Fed. Reg. 39532 (Aug. 3, 1994) (proposal to list Arkansas River shiner as endangered); 59 Fed. Reg. 39532 (Aug. 3, 1994) (proposal to list cactus ferruginous pygmy-owl as threatened in Texas).

[48] 59 Fed. Reg. 58982 (Nov. 15, 1994) (list of animals FWS is reviewing for possible addition to its list of endangered and threatened species).

information indicating that a proposal to list is "possibly appropriate."[49]

The species already listed as endangered and threatened are found in most of the counties in Texas. Taking into account the migratory route of the whooping crane adds considerably more counties. In all, 210 of the 254 counties in Texas are already covered to some extent.[50] The vast majority of these species are on private and state land, since the vast majority of land in Texas is private or state-owned.[51] The federal government owns less than two percent of Texas land--a far lower percentage than elsewhere in the West.

While it is possible to know in general where these species are found in Texas, it is usually impossible for a landowner to know whether his or her land is regulated by FWS, for two reasons. First, *FWS does not delineate the habitat* of most listed species. Although the ESA requires a species' "critical habitat" to be designated to the maximum extent determinable and prudent at the same time it is listed,[52] FWS usually does not designate critical habitat when the species is listed or afterwards. For example, FWS has designated critical habitat for only 10 species found in Texas.[53]

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[49] *Id.* FWS states that "persuasive data on biological vulnerability and threat are not currently available to support proposed rules." *Id.*, at 58983.

[50] The August 1992 FWS study provides, for each species, a map highlighting the counties that include range of the species, including the migratory path of the whooping crane.

[51] Indeed, the majority of all listed species in the United States are on nonfederal land. In a December 1994 report, the General Accounting Office stated, "Over 90 percent (712 of 781) of the listed species [including plant species] in the United States for which the Service had responsibility as of May 10, 1993, have some or all of their habitat on nonfederal lands." General Accounting Office, *Species Protection on Nonfederal Lands* 4 (1995). Of the 359 listed animal species, 247 (about 69 percent) have over 60 percent of their total habitat on nonfederal lands. *Id.*, at 5.

[52] 16 U.S.C. § 1533(a)(3).

[53] The FWS's reluctance to designate critical habitat is understandable in light of the public outrage ignited by the leaked proposal to designate about 800,00 acres throughout Central Texas as critical habitat this past summer. The use of its overexpansive "harm" definition (as determined by biologists

For the other listed species in Texas, which do not have designated critical habitat, FWS gives only general information on the species' location, such as merely listing the counties in which the species is found.[54] Such information is of little or no use to landowners who need to know whether their land may be affected by the FWS prohibition on habitat modification. Nor is it usually possible for landowners to make such a determination themselves. In effect, FWS puts the burden on landowners to prove that their land does not contain habitat.

The second reason why the geographical boundaries of the FWS regulation as to a listed species are unclear is that FWS's application is *not limited to habitat*, whether or not it is delineated. FWS believes that it may regulate any activity that might affect habitat, even if the activities and the habitat are hundreds of miles apart. Regulation is not therefore limited to actual habitat, but has been applied by FWS to also reach a vast amount of additional land in Texas.[55]

2. THE FWS LAND REGULATION SYSTEM DOES NOT MAKE CLEAR WHAT USES OF LAND ARE PROHIBITED; IN PARTICULAR, USES MAY BE PROHIBITED WITHOUT ANY EVIDENCE THAT THEY RESULT IN PHYSICAL INJURY TO AN INDIVIDUAL MEMBER OF A SPECIES.

The reach of the FWS's regulation of land is extended further because the FWS "harm" interpretation does not require that the purportedly prohibited activities cause physical injury in fact to an individual member of a listed species. Under the FWS interpretation of "harm," habitat modification, without more, equals a prohibited take.

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and technicians) against landowners is easier than engaging in the public process for designating critical habitat.

[54] *See* FWS, *Threatened and Endangered Species of Texas* (1992).

[55] Examples of this broad regulation have already been given: The proposed listing of the Barton Springs salamander would affect 354 square miles of watershed for the aquifer that feeds Barton Springs. The judge in the *Sierra Club* case pending in the Western District of Texas has repeatedly threatened to impose aquifer-wide pumping regulations on the basis of alleged modifications to spring-fed habitat literally a hundred or more miles away from pumpers who would be affected by such an order.

In its brief, Petitioners dispute this. They repeatedly state that the definition of "harm" prohibits only habitat modification that "actually kills or injures wildlife." Petitioners admit, however, that this language does not limit the regulatory definition to actions that cause physical injury to an individual member of a listed species.[56] The language Petitioners emphasize does not, however, narrow the scope of the definition in any way.

The substance of the FWS regulatory definition is in the second sentence, which states, in effect, that "harm" equals "habitat modification." The second sentence makes clear that habitat modification may "injure[] wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3. Therefore, to establish "harm"--and thus a "take"--FWS need only show that essential behavioral patterns may be "significantly impair[ed]" by habitat modification.

This language is remarkably vague. In reality, it is clear that FWS generally ignores the vague and redundant terms and simply interprets the definition as equating "harm" with "habitat modification." Thus, for example, the clearing of cedar trees by a landowner has been bootstrapped into a "take" of a golden-cheeked warbler whether or not one is actually killed or injured and the pumping of Edwards Aquifer groundwater by a farmer or rancher is bootstrapped into a "take" of a fountain darter located one hundred or more miles away.

Statements of the FWS in Texas, and actions taken by it in Texas, confirm this assertion. For instance, in a presentation to a committee of the Texas legislature, Mr. Sam Hamilton, State Director for FWS in Texas, stated: "When the golden-cheeked warbler was listed in 1990, it received the full protection of the ESA *and that included protecting the habitat it depends on.*"[57]

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[56] *Petitioners Brief*, at 6-7. "Nothing in the regulation indicates that the injury, of whatever type, is to an individual, as opposed to some indefinite injury to the species in general."

[57] *House Committee on Natural Resources Subcommittee on Mitigation of Property Rights* (August 9, 1994) (statement of Sam Hamilton) (copy on file with Texas House of Representatives Archives, Tape 1, Side A) (emphasis added).

Mr. Hamilton admitted that available uses of property decreased because of the mere listing of the warbler.

Mr. Hamilton's statements are based on FWS's expansive interpretation of "harm" definition. Once a species is listed, the use of property--public or private--within the species' range, *or potential range*, is immediately and presumptively affected.[58] There is nothing in the ESA to suggest that this was intended by Congress, especially where it results in so pervasive a displacement of property rights and traditional state police powers.

a. The Golden-Cheeked Warbler: Federal Land Use Restrictions Imposed on Private Property by Application of the "Harm" Regulation.

FWS's treatment of the habitat of the golden-cheeked warbler, which it designated as endangered in 1990, presents an example of the FWS overexpansive interpretation.[59] The golden-cheeked warbler is found in 33 Texas counties in Central Texas.[60]

Since 1990, FWS has sent dozens of letters to landowners in Central Texas (the "bird letters") informing them that using their property in various ways would be a "take" of the warbler.[61]

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[58] Secretary Babbitt stated to a United States Senate subcommittee investigating the National Biological Survey Act of 1993 that property in the range or potential range is "under a cloud that cannot be lifted" until accurate scientific data is available: "Good data will remove uncertainty and in the vast majority of cases, increase property values by showing conclusively there is no problem." Testimony before Senate Subcommittee, *Endangered Species Act--Incentives to Encourage Conservation by Private Land-Owners: Hearings Before Subcomm. on Environment and Natural Resources of the Committee on Merchant Marine and Fisheries House of Representatives*, at 25, 103rd Cong., 1st Sess. 65 (1993).

[59] 55 Fed. Reg. 18844 (May 4, 1990) (emergency listing); 55 Fed. Reg. 53153 (Dec. 27, 1990) (final listing).

[60] FWS, *Threatened and Endangered Species of Texas* B7 (1992).

[61] These letters have been issued and not rescinded despite the statement by Secretary Babbitt to then-Governor Ann Richards in a September 22, 1994 letter that "[m]ost warblers live on rocky slopes. Since most agricultural and building activity does not occur on rocky slopes, those activities should not affect warbler conservation." The letter is attached in the Appendix at 6a.

Several of the bird letters are attached at Appendix 9a-39a.[62] The usual pattern of the letters is as follows:

--they state that the property would[63] or could[64] provide suitable habitat for the golden-cheeked warbler;[65]

--they sometimes state that the property is part of a larger area that contains habitat occupied by the warbler[66] or that warblers have been sighted nearby,[67] but almost never that warblers have actually been sighted on the property itself or are known to occupy habitat on the property;

--they state that clearing or development-related activities would[68] or could[69] constitute a "take" of the warbler; and

--they state that the activities would require FWS authorization through an ESA Section 10(a) permit[70] or they "recommend" that clearing or other similar activity be discontinued.[71]

The bird letters thus equate modifying habitat *per se* with a "take." They do not state that the land use will result in death or injury to warblers, or even that it will "significantly impair essential behavioral patterns." On the contrary, when the letters

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[62] Ten of the fourteen attached letters are from 1994, three are from 1993, and one is from 1991.

[63] Letters Appendix, 11a, 13a, 15a, 27a, 35a.

[64] Letters Appendix 21a, 23a.

[65] Other formulations include "prime habitat" for the warbler (Letter 9a); habitat likely to be occupied by the warbler (Letter 33a); and vegetation that is possibly occupied by the warbler (Letters 19a, 25a).

[66] Letters 35a, 37a.

[67] Letters 13a, 19a, 30a, 37a.

[68] Letters 13a, 15a, 23a, 27a, 35a.

[69] Letters 30a, 37a.

[70] Letters 13a, 15a, 23a, 27a.

[71] Letters 17a, 19a, 25a, 33a. Another form is to recommend that authorization under the ESA be secured before any development. Letters 30a, 35a, 37a. Letter 9a "respectfully urges" that clearing be discontinued, but only after describing the ESA's civil and criminal sanctions and informing the landowner that the matter is under investigation by the FWS Law Enforcement Office.

add to the above structure, they usually state only that "disturbing" habitat constitutes "harm,"[72] or that "disrupting" the breeding and/or foraging activities of the warbler constitutes a take.[73] FWS thus ignores its own statement, at the time it promulgated the "harm" definition, that it chose the word "impair" rather than "disrupt" "to limit harm to situations where a behavioral pattern was adversely affected and not merely disturbed on a temporary basis with no consequent injury to the protected species."[74]

b. The Piping Plover: Federal Land Use Restrictions Imposed on State Property by Application of the "Harm" Regulation.

The piping plover was listed as an endangered species on December 11, 1985.[75] Its listing has impacted the value of land legal title to which is held by the Texas for the benefit of school children supported by the Texas Permanent School Fund ("PSF"). The PSF is managed by the Texas General Land Office ("GLO"), a state agency.

In 1984, after consultations with the Texas Parks and Wildlife Department and FWS, the GLO issued a seismic exploration permit for land in the Lower Laguna Madre (a bay) in Kenedy County, Texas. FWS required the state to investigate whether the piping plover occupied the area. Despite the fact that no piping plovers were found in the area, FWS insisted that additional measures be undertaken, to avoid impacts to *potential* habitat. The added requirements proved so burdensome and potentially expensive that all exploration efforts were abandoned. The result is a potentially large loss of revenue, present and future, to the PSF for the benefit of Texas schoolchildren, and a denial of a state agency's ability to meet its statutory obligations.

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[72] Letters 17a, 21a.

[73] Letters 19a, 25a, 33a. Other letters state only that the warbler is "sensitive" to factors associated with residential development. Letters 13a, 15a, 27a, 30a, 35a, 37a.

[74] 46 Fed. Reg. 54748, 54750 (Nov. 4, 1981).

[75] 50 Fed. Reg. 50733 (Dec. 11, 1985).

3. THE PERMIT PROCESS IS LENGTHY AND EXPENSIVE, AND IN EFFECT REVERSES THE LAND ACQUISITION PROGRAM CREATED IN THE ESA.

Landowners subject to the FWS resource management scheme have only one recourse: seek a ESA § 10(a) "incidental take" permit.[76] The applicant must submit a habitat conservation plan for the species.[77] This process is necessarily expensive, since it requires hiring legal and technical consultants and preparing lengthy applications.[78] The process is also lengthy and has only resulted in 31 permits as of June 1994.[79] The FWS's "harm" regulation expands the "incidental take" permit program in a fundamental way not contemplated by the ESA: the permit process is triggered in situations where there has been no actual physical harming of a protected species, and it has not been determined that the activities would actually "kill" or "injure' a listed species.

In addition, the permit process imposes requirements not contemplated by the ESA. Although ESA § 9 does not prevent private landowners from takes of listed plants, the conservation plan must, *inter alia*, ensure that any listed plants located on the tract in question are not jeopardized.

The most striking aspect of the permit process is how FWS uses it to overturn the land acquisition program created by the ESA § 5. ESA §5 provides that landowners be paid for the use of their land if its acquisition by the federal government is necessary to protect listed species. In implementing its "habitat modification is harm" regulation, on the other hand, FWS often "extorts" substantial concessions from the applicant before it approves the ESA § 10(a) permit. FWS has in effect reversed the program actually created by Congress.

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[76] In order to secure an ESA § 10(a) permit, the landowner must submit a "habitat conservation plan" ("HCP"). 16 U.S.C. § 1539(a)(20(A).

[77] ESA § 10(a)(2)(A), 16 U.S.C. § 1539(a)(2)(A).

[78] *See* 50 C.F.R. § 17.22(b)(1) (application requirements).

[79] General Accounting Office, *Species Protection on Nonfederal Lands* 8 (1995).

CONCLUSION

Under *Chevron* step two analysis, review of a challenged agency regulation falls under the prudential "deference to the administrative agency" standard. Because, however, the "harm" regulation adopted by FWS results in federal intrusion into areas of traditional state authority, the plain statement rule supersedes this deference. ESA § 9 contains no authority supporting the notion that Congress intended to include habitat modification within the prohibition entailed in ESA § 9 or that Congress intended deep intrusions into the sovereign power of the states. In sum, the ESA provides no indication that Congress intended to shift vast resource management powers and rights (such as water resource management and land use planning) from the states to a federal bureaucracy.

The "harm" regulation should, furthermore, be measured against the language of the ESA and Congressional intent in a manner to avoid constitutional issues such as the federalism and state sovereignty issues raised by Texas. The FWS's interpretation of "harm" places the weight of an enormous *de facto* federal resource management scheme on a single word, "harm," added without debate through a technical amendment to a ten-word definition. Congress did not intend this single word to authorize such a scheme.

For these reasons, FWS interpretation of the term "harm" should be held invalid and the Court of Appeals decision should be affirmed.

DAN MORALES
ATTORNEY GENERAL OF TEXAS

JORGE VEGA
FIRST ASSISTANT ATTORNEY GENERAL

JAVIER AGUILAR*
SPECIAL ASSISTANT ATTORNEY GENERAL
*COUNSEL OF RECORD
COUNSEL FOR AMICUS CURIAE

SAM GOODHOPE
SPECIAL ASSISTANT ATTORNEY GENERAL;

PAUL TERRILL
ASSISTANT ATTORNEY GENERAL

EUGENE MONTES
ASSISTANT ATTORNEY GENERAL

APPENDICES

PRIVATE GROUPS ENDORSING THIS BRIEF

Associated Milk Producers

The Association is the nation's largest dairy farmer cooperative. Its members produce twelve percent of the nation's milk supply.

Association of Texas Soil and Water Conservation Districts

The Association is a nonprofit organization organized for the purpose of conducting educational, scientific, charitable, and religious work concerning the conservation, maintenance, improvement, development and use of land, soil, water, trees, vegetation, fish and wildlife, open spaces, and other renewable natural resources.

Exotic Wildlife Association

The Association is comprised of businessmen and ranchers joining to protect and promote the rights of private ownership as well as develop and expand non-native breeding throughout the United States.

Independent Cattlemen's Association of Texas

The Association is made up of ranchers, cattlemen, feed dealers, equipment suppliers and others involved in Texas agriculture. Its members are working to help rural Texas grow and to protect the rights of Texas agriculture.

Livestock Marketing Association of Texas

The Association represents the interests of livestock auctions, order buyers and livestock dealers throughout Texas.

Lumbermen's Association of Texas

Lumbermen's is a trade association for retail lumber dealers.

National Land Rights Association

The organization represents landowners, scientists, and natural resource professionals dedicated to the conservation of our natural resources through the protection of private property rights.

Rio Grande Valley Sugar Grower's

The organization is a cooperative of various sugar cane growers within the Rio Grande Valley dedicated to improving the overall efficiency of their industry

Riverside and Landowners Protection Coalition

The Coalition is a non-profit corporation whose members own and operate rural land throughout Texas. The group is committed to educating the general public on private property issues and working state and federal agencies in preserving the privacy of private property in Texas.

South Texas Cotton And Grain Association

The Association represents farm growers in the Coastal Bend, Upper Coast and Winter Garden regions of Texas.

Southern Rolling Plains Cotton Growers Association

The Association represents various cotton producers in the Southern Rolling Plains of Texas.

Southwest Association

The Association represents various hardware retail stores and farm equipment retail dealers throughout Texas.

Southwestern Public Service Company

Southwestern is an investor-owned electric utility serving approximately one million persons in parts of southwestern Kansas, the Oklahoma Panhandle, the Panhandle and South Plains of Texas, and eastern New Mexico.

Take Back Texas

The association is a grassroots organization dedicated to protecting the private property rights and freedoms of landowners throughout Texas.

Texas and Southwestern Cattle Raisers Association

The Association represents the interests of various cattle raisers throughout Texas and the Southwest.

Texas Agriculture Industries Association

The Association is a non-profit entity representing the plant food and crop protection industries in Texas.

Texas Agricultural Aviation Association

The Association is a small business trade group of individuals and families engaged in the aerial application profession.

Texas Agricultural Cooperative Council

The Council is a trade association representing the cooperatively-organized agribusiness firms operating in Texas.

Texas Agri-Women

The association is a non-profit, non-partisan organization primarily composed of farm and ranch women, agri-business women and consumers working together to develop and promote agriculture.

Texas Association of Dairymen

The Association represents the interests of various dairy families throughout Texas for the purpose of providing the best possible environment for the dairy industry.

Texas Association of Nurserymen

The organization is a trade association representing the wholesale production, retail garden center, landscape professional and allied supplier segments of the nursery industry in Texas.

Texas Cattle Feeders Association

The Association represents the interests of individuals and business entities involved in the cattle feeding industry in Texas, Oklahoma, and New Mexico.

Texas Cotton Ginners' Association

The Association is composed of active cotton ginners throughout Texas and is dedicated to assisting the industry in addressing mutual challenges

Texas Cotton Producers

The organization represents the interests of various cotton and grain producers throughout Texas.

Texas Farm Bureau

The Bureau is an independent, non-governmental, voluntary organization of farm and ranch families united for the purpose promoting and protecting the interests of the agricultural community.

Texas Farmer's Union

The Union is a non-profit organization composed of family farmers and ranchers promoting agriculture.

Texas Food Processors Association

The organization is a non-profit trade association representing companies engaged in the processing of food products in Texas. It is dedicated to support, promote, and encourage education in all aspects of the food industry in Texas.

Texas Forestry Association

Texas Forestry Association is a non-profit trade association of landowners, logging contractors, professional foresters, and processing mills dedicated to the conservation and wise utilization of our forest resources in East Texas.

Texas Grain Sorghum Association

The Association represents the interests of sorghum producers and agribusiness representative who are working to protect the viability of American agriculture.

Texas Justice Foundation

The Foundation is a non-profit corporation that provides free legal representation in cases involving the protection of individual rights and/or cases that seek to limit government to its proper role.

Texas Poultry Federation

The association represents the interests of several segments of the poultry industry in Texas including the Texas Broiler Council, Texas Egg Council, Texas Poultry Improvement Association, Texas Allied Poultry Association, and the Texas Turkey Federation.

Texas Rice Producers Legislative Group

The organization represents rice producers in the state of Texas who have joined together to work for the betterment of the Texas rice industry.

Texas Wheat Producers Association

The Association represents various farmers that produce wheat on the land they own, rent or lease in 220 of Texas' 254 counties.

Texas Wildlife Association

The Association in a non-profit entity which serves as an advocate for the rights of wildlife, wildlife managers, landowners, and hunters. It is dedicated to the maintenance, management, and enhancement of wildlife habitat on private land.

LETTER TO ANN RICHARDS FROM BRUCE BABBITT

THE SECRETARY OF THE INTERIOR
WASHINGTON
September 22, 1994

Honorable Ann W. Richards
Governor of Texas
Austin, Texas 78711

Dear Governor Richards:

I appreciated receiving your recent letter suggesting ways in which the Department could work more effectively with the State of Texas and its citizens to meet the goals of the Endangered Species Act.

Like yourself, I recognize the success the Act has had in Texas as well as in the rest of the country.

I am also convinced that effective implementation of the act is consistent with the traditional rights and responsibilities of property owners. I believe, however, that the built-in flexibility of the Act has not been routinely used in a way that gives private landowners the security and certainty they need when making important land-use decisions. Too often, the Federal Government has failed to pursue creative conservatism solutions with landowners, making the listing of species a first and last resort.

Your persuasive advocacy of the concerns of ranchers and farmers in Texas has been a valuable contribution to us as we seek ways to meet the goals of the Act. Your letter contained several constructive proposals that I instructed my staff to analyze immediately. Some of those points need further review. However, I believe that several of your ideas exemplify the new flexibility we need in enforcing the Act.

As you are aware, I have personal knowledge of the State and local government efforts to create conservatism initiatives protecting the warbler. The Fish and Wildlife Service's work thus far clearly indicates that , if the appropriate habitat conservation plans are implemented within a reasonable period of time, the designation of critical habitat for the warbler will be neither necessary nor prudent because it will provide no net benefit to the species. I have therefore instructed the U.S. Fish and Wildlife Service to cease work on warbler critical habitat designation. Instead, Service personnel will direct their energies towards working with the State, local governments, property owners and other interested citizens to establish habitat conservation plans that protect both our natural heritage and our economic potential.

I agree with you that normal agricultural and ranching activities in Texas have little impact on golden cheeked warbler habitat.

Assertions that protection of the warbler in Texas would have a significant negative impact on such practices are wrong. The Department testified recently before a joint hearing of the State Legislature's Natural Resources Committee and said unequivocally that if land has been plowed or farmed for years, it is not warbler habitat. While the Act does not give us the authority to exempt specific land-use practices, as a practical matter traditional ranching and farming activities will not hinder warbler conservation. Regrowth cedar that has invaded cleared fields is also not habitat, and can be cleared without concern. Most warblers live on rocky slopes. Since most agricultural and building activity does not occur on rocky slopes. those activities should not affect warbler conservation.

I believe the Department has been remiss in failing to give adequate guidance on this matter, which has led to an abundance of misinformation on the topic. I have asked U.S. Fish and Wildlife Service Director Mollie Beattie to work

closely with the State to issue such guidance as soon as possible before the end of the year. You should know that in July, the Service changed its policy to ensure that when a listing occurs, the listing package will include a document specifying activities that will not be affected by the listing.

I also agree with your proposal to examine and recommend ideas for changes to the implementation of the Act in Texas. I have asked Director Beattie to work with your office and affected constituents to develop a process designed to achieve this goal.

Making the flexibility in the Act work will require input from affected citizens, State and local governments. The State of Texas has continually offered constructive advice and input into our process. In fact, Texas has become a national leader in establishing a working relationship with the Federal Government on specific endangered species issues. I will continue to welcome any information from Texas concerning listed or candidate species, including evidence to support a petition that would delist a species.

Be assured that future information provided by Texas on any species will receive serious consideration.

Your personal involvement has been key to developing solutions for these natural resources issues. I look forward to a continued working relationship with both you and the Texas Legislature.

Sincerely,

s/ Bruce Babbitt

LETTERS TO CENTRAL TEXAS LANDOWNERS

UNITED STATES
DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
Ecological Services
Stadium Centre Building
711 Stadium Drive East, Suite 252
Arlington, Texas 76011

February 20, 1991

Mr. & Mrs. Mike Igua
P.O. Box 4748
Lago Vista, TX 78645

Dear Mr. & Mrs. Igua:

It has come to our attention that clearing of a strip of woodland has recently occurred on a tract of land located south of FM 1431 in the vicinity of Lago Vista, Texas. We understand that you are one of the joint owners of the property. Information available to us indicates that this property supports prime habitat for the federally-listed endangered golden-cheeked warbler. Destruction of habitat of an endangered species may constitute a "take" of that species as defined by the Endangered Species Act, which prohibits "take" of a federally-listed species unless the "take" is incidental to otherwise lawful activity and a permit in compliance with the Act has been obtained. In this case, a permit under Section 10(a) of the Act would apply. Information on the Section 10(a) permit process is enclosed.

Destruction of endangered species habitat, without a permit, that results in "take" of a federally-listed endangered species could be held to be a violation of the act and could expose a violator to the criminal penalties provided for under Section 11(b)(1) of the Act or to the civil penalties provided for under Section 11(a)(1) of the Act. Section 11(b)(1) provides for a fine of not more that $50,000 or imprisonment up to one year, or both. Section 11(a)(1) permits assessment of up to $25,000 as a civil penalty for each violation.

This matter is currently under investigation by Special Agent Alex Hasychak of the Fish and Wildlife Service Law Enforcement Office in San Antonio and by personnel of this office. If you are indeed an owner of the property in question, we respectfully urge that you cease any further land clearing activities and contact Alex Hasychak at (512) 229-5412 or Joe Johnston of this office at (817) 885-7830 for additional information on compliance of such activities with the Endangered Species Act.

Sincerely,

Robert M. Short
Field Supervisor

Enclosure

cc: Law Enforcement, FWS, San Antonio, TX
Regional Director, FWS, Albuquerque, NM (FWE/HC)
Regional Solicitor, USDI, Tulsa, OK

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

Marge Krueger
6208 Shadow Mountain Drive
Austin, Texas 78731

Dear Ms. Krueger:

This responds to our telephone conversation of June 7, 1993, requesting that this office reevaluate the following property for its suitability as habitat for federally listed threatened or endangered species:

> Lot in Jester Point, Phase I, or 7101 Foxtree Cove, Austin, Travis County, Texas

We have reviewed the information you provided as well as other available information concerning the potential of the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates.

We believe this property would be suitable habitat for the federally listed endangered golden-cheeked warbler and/or the cave invertebrates. We believe that clearing or development-related activities of this acreage would constitute a "take" as defined by Endangered Species Act (Act). The Act prohibits the "take" of a federally listed species unless the "take" is incidental to an otherwise lawful activity and a section 10 (a)(1)(B) permit under the Act has been obtained. Therefore, our biological evaluation of

development on the subject lot and compliance with the Act remains unchanged.

We appreciate your concern for endangered species and your desire to comply with the Endangered Species Act. This response is intended to assist you in such compliance. You are ultimately responsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional, or local development requirements. If you wish to discuss this further, please contact Alma Barrera at 512-482-5436.

Sincerely,

Sam D. Hamilton
State Administrator

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

June 24, 1993

Phil Frazier
Horizon Environmental Services, Inc.
P.O. Box 162017
Austin, Texas 78746

Dear Mr. Frazier:

This responds to your letter, dated May 24, 1993, requesting this office review the following property for its suitability as habitat for federally listed threatened or endangered species:

> 0.321 acres located on Lakeview Drive in Comanche Trail Subdivision, Travis County, Texas.

We have reviewed the information you provided as well as other available information concerning the potential for the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates. We believe this property would not provide suitable habitat for the black-capped vireo and the cave invertebrates, but would provide suitable habitat for the golden-cheeked warbler.

Our records indicate that golden-cheeked warblers have been observed on the periphery of this property. Current biological information indicates the warbler is sensitive to several factors associated with residential development, including increases in noise levels, predators, human activity

in nesting areas, and other disturbance factors. We believe that clearing or development-related activities of this area, would constitute a "take" as defined by the Endangered Species Act (Act). The Act prohibits "take" unless it is incidental to an otherwise lawful activity and been authorized under section 7 or section 10(a)(1)(B) of the Act. Therefore, construction in this area would require authorization under the Act.

We appreciate your concern for endangered species and your desire to comply with the endangered Species Act. This response is intended to assist you in such compliance. You are ultimately responsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional, or local development requirements. If you wish to discuss this further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

Sam D. Hamilton
State Administrator

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

December 3, 1993

Keith E. Young
KEY Group Engineering
3701 Bee Caves Road, Suite 102
Austin, Texas 78746

Dear Mr. Young:

This responds to your letter, dated August 31, 1993, requesting this office review the following property for its suitability as habitat for federally listed threatened or endangered species:

> Part of 25.4 area tract located 4.1 miles from 1431 off Lime Creek Road, Travis County, Texas

We have reviewed the information you provided as well as other available information concerning the potential for the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates. We believe this property would provide suitable habitat for the golden-cheeked warbler, the black-capped vireo and/or the cave invertebrates.

The subject tract is part of a large tract occupied by golden-cheeked warbler, black-capped vireo and/or the cave invertebrates. Additionally, areas that are biologically necessary for the continued existence of a species may not be continuously occupied by that species. Current biological

information indicates the warbler and vireo are sensitive to several factors associated with residential development, including increases in noise levels, predators, human activity in nesting areas, and other disturbance factors. We believe that clearing or development-related activities of this area, would constitute a "take" as defined by the Endangered Species Act (Act). The Act prohibits "take" unless it is incidental to an otherwise lawful activity and been authorized under section 7 or section 10(a)(1)(B) of the Act. Therefore, construction in this area would require authorization under the Act.

We appreciate your concern for endangered species and your desire to comply with the Endangered Species Act. This response is intended to assist you in such compliance. You are ultimately responsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional, or local development requirements. If you wish to discuss this further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

/s/ Jana Grote

Sam D. Hamilton
State Administrator

Enclosure

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

January 13, 1994

Patrick Noack
2000 Yaupon Valley Road
Austin, Texas 78746

Dear Mr. Noack:

It has come to our attention that clearing and construction activities associated with residential development are occurring on a 23-acre tract located off Yaupon Valley Road in Westlake Hills, Travis County, Texas. Information received from the Travis County Tax Appraisal District indicates that you are the owner of this property.

The Fish and Wildlife Service (Service) has reviewed this property for endangered species concerns in a letter, dated June 10, 1992, (see enclosed copy). In this letter, based on biological surveys provided by Horizon Environmental Services and other information available at that time, our agency advised that development of this tract would require a permit for "incidental taking" under section 10(a)(1)(B) of the Endangered Species Act (Act). Further development of this property would be prohibited under section 9 of the Act. We are providing information on this section 10(a)(1)(B) permitting process for your information.

Provisions of the Act prohibit unauthorized take of endangered species listed under the Act. "Take" is defined as activities that harass, harm, pursue, hunt, shoot, wound, kill,

trap, capture, or collect, or attempt to engage in such a conduct. "Harm" in this definition includes the disturbance or destruction of habitat occupied by the species or necessary for its recovery. Activities that could affect the warbler include clearing, construction, or change in flora or fauna of areas in or adjacent to habitat.

The Service recommends no further development activities occur on this lot and that all construction and vegetation clearing stop immediately. Failure to stop these activities immediately could result in a violation of the Act and possible criminal or civil actions that could result in fines and/or imprisonment.

Should you have any questions regarding the determination on this property, or would like to have a meeting concerning this property and the section 10(a)(1)(B) permitting process, please contact Bob Simpson at 512/482-5436.

Sincerely,

/s/ Joseph E. Johnston

Sam D. Hamilton
State Administrator

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

January 13, 1994

Jerri Garner
25613 River Fern Court
Leander, Texas 78641

Dear Ms. Garner:

This letter is in reference to recent clearing activities on the property across River Fern Court from your horse stable operations near Leander, in Williamson County , Texas. This property supports vegetation that is possibly occupied by the federally listed endangered golden-cheeked warbler. According to our files, golden-cheeked warblers have been sighted on adjacent properties in similar habitat, and are very likely present on your property close to the area that has been cleared.

If the activities taking place on the subject site are in any way disrupting the breeding and/or foraging activities of the federally protected golden-cheeked warbler, these activities would constitute a "take" of listed species. Take of listed species is prohibited under section 9 of the Endangered Species Act (Act) and must be avoided or authorized under section 7 or section 10 of the Act.

The term "take" means to harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct. "Harm" in this definition of "take" in the Act means an act which actually kills or injures wildlife. Such

act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. "Incidental taking," authorized under section 7 or 10 of the Act, means any taking otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

Based on aerial photographs, and other information available to this office, we recommend that clearing activities on the property be discontinued and a biological survey be performed by qualified biologists to determine if this habitat is currently being utilized by golden-cheeked warblers. This would help you, and our office, determine if further development of this site would require authorization under the Act. Please see the appropriate enclosures for minimal survey requirements for the golden-cheeked warbler.

If you have further questions regarding the ecology of the golden-cheeked warbler, of the Act, please contact Bob Simpson of my staff at (512) 482-5436.

Sincerely,

/s/ Jana Grote
/s/ Joseph E. Johnston

Sam D. Hamilton
State
Administrator

cc: Jean Nance

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

January 13, 1994

Austin Americana Enterprises
Rex Bohls
1301 S IH-35
Austin, Texas 78741

Dear Mr. Bohls:

It has come to our attention that clearing and construction activities associated with residential development are occurring on a 473 acre tract of land known as the Friendship Ranch in Hays County, Texas. Information received from the Hays County Tax Appraisal District indicates that you are the owner of this property.

The Fish and Wildlife Service reviewed this property in a letter to the Doug Hodge Company on October 16, 1991, for endangered species concerns (see enclosure). In that letter we stated that, based on aerial photographs and other data available to this office, the property could provide suitable habitat for the federally listed and protected golden-cheeked warbler (*Dendroica chrysoparia*). We also included information regarding minimal survey (warblers) using the property.

Provisions of the Act prohibit unauthorized take of endangered species listed under the Act. "Take" is defined as activities that harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such a conduct. "Harm" in this definition includes the disturbance or destruction of habitat occupied by the species or necessary

for its recovery. Activities that could affect the warbler include clearing, construction, or change in flora or fauna of areas in or adjacent to habitat.

We have not received any information, since that correspondence, to change our determination that the subject property could provide suitable habitat for the warbler. If there are warblers present on this property, development could require a permit for "incidental taking" under section 10(a)(1)(B) of the Endangered Species Act (Act). We are providing information on the section 10(a)(1)(B) permitting process for your consideration and urge you to contact this office for further assistance on how to comply with the Act.

Should you have any questions regarding this property, or would like to schedule a meeting concerning this property and the section 10(a)(1)(B) permitting process, please contact Bob Simpson at 512/482-5436.

Sincerely,

/s/ Joseph E. Johnston

Sam D. Hamilton
State
Administrator

Enclosure

cc: Alex Hasychak, FWS, Special Agent, Law Enforcement

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

January 25, 1994

Lee Sherrod
Horizon Environmental Services, Inc.
P.O. Box 162017
Austin, Texas 78716

Dear Mr. Sherrod:

This responds to your fax, dated September 17, 1993, requesting that this office evaluate the following property for its suitability as habitat for federally listed threatened or endangered species:

> Two tracts on River Hills Road off FM 2244 (Bee Caves Road), Austin, Travis County, Texas

We have reviewed the information on the 1991 and 1993 surveys you provided as well as other available information concerning the potential for the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates. We believe that this property would not provide suitable habitat for the black-capped vireo or the cave invertebrates, but could provide suitable habitat for the golden-cheeked warbler.

Because of sightings on or adjacent to these tracts, we believe that clearing or development related activities on this acreage would constitute a "take" as defined by Endangered Species Act (Act). The Act prohibits the "take" of a federally listed species unless the "take" is incidental to an

otherwise lawful activity and section 7 or section 10(a)(1)(B) permit under the Act has been obtained. Therefore, development of this acreage would require authorization under the Act.

Thank you for providing pertinent information regarding this evaluation. This response is intended to assist you in such compliance. You are ultimately responsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional or local development requirements. If you wish to discuss this further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

/s/ Jana Grote

Sam D. Hamilton
State Administrator

Enclosure

cc: City of Austin, Conservation & Environmental Department
City of Austin, Electric Department
Jim Nuckles, Travis County Tax Appraisal District

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

April 7, 1994

This letter is in reference to recent clearing activities on your property on FM 1340 near Hunt, in Kerr County, Texas. This property supports vegetation that is possibly occupied by the federally listed endangered golden-cheeked warbler. According to our files, golden-cheeked warblers have been sighted on adjacent properties in similar habitat, and are possibly present on your property close to the area that has been bulldozed.

If the activities taking place on the subject site disrupt the breeding and/or foraging activities of the federally protected golden-cheeked warbler, these activities would constitute a "take" of listed species. Take of listed species is prohibited under section 9 of the Endangered Species Act (Act) and must be avoided or authorized under section 7 or section 10 of the Act.

The term "take" means to harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct. "Incidental taking", authorized under section 7 or 10 of the Act, means any taking otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

Based on aerial photographs, and other information available to this office, we recommend that clearing activities on the property be discontinued and a biological survey be performed by qualified biologists to determine if this habitat

is currently being utilized by golden-cheeked warblers. This would help you, and our office, determine if further development of this site would require authorization under the Act. Please see the enclosure for minimal survey requirements for the golden-cheeked warbler.

If you have further questions regarding the ecology of the golden-cheeked warbler, or the Act, please contact Bob Simpson of my staff at (512) 482-5436.

Sincerely,

/s/ Joseph E. Johnston

Field Supervisor

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

April 14, 1994

Lee Sherrod
Horizon Environmental Services, Inc.
P.O. Box 162017
Austin, Texas 78716

Dear Mr. Sherrod:

This responds to your letter dated March 4, 1994, requesting this office review the following property for its suitability as habitat for federally listed threatened or endangered species:

> Painted Bunting Subdivision, Austin, Travis County, Texas

We have reviewed the information you provided as well as other available information concerning the potential of the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates. Based on current biological information, we do not believe that this property would provide suitable habitat for the black-capped vireo or the cave invertebrates, but would provide habitat for the golden-cheeked warbler.

Your bird survey indicates that two golden-cheeked warblers were observed in the canyon. Current information indicates the warbler is sensitive to several factors associated with residential development, including increases in noise levels,

predators, human activity in nesting areas, and other disturbance factors. Therefore, we believe that clearing or development-related activities on Lots 6-13, would constitute a "take" as defined by the Endangered Species Act. The Act prohibits the "take" unless it is incidental to an otherwise lawful activity and section 10(a)(1)(B) permit under the Act has been obtained. Therefore, construction of residences on these lots would require authorization under the Act.

However, construction on Lots 1-4 and 14-15 (drawing enclosed) would not require authorization under the Act if the following conservation measures are incorporated in the construction.

1. Remove only those trees and shrubs necessary for construction of driveway, septic tank and house.

2. Confine the development activities on the front 200 feet of the lot.

3. Use only native plant species for landscaping.

4. Confine exterior construction activities so that it occurs outside the breeding season for the golden-cheeked warbler (breeding period is from March 1 through August 1), so as to avoid disruption of breeding behavior.

We believe that destruction of the habitat located beyond the front 200 feet of the lot could result in a "take" of the endangered golden-cheeked warbler and thus, require authorization under the Act.

We appreciate your concern for endangered species and your desire to comply with the Act. This response is intended to assist you in such compliance. However, you are ultimately responsible for compliance with all laws, and this letter cannot assure you complete protection from any future liability or exempt you from any current or future federal,

state, regional or local development requirements. If you wish to discuss this matter further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

Field Supervisor

Enclosure

cc: City of Austin, Conservation & Environmental Department
City of Austin, Electric Department
Jim Nuckles, Travis County Tax Appraisal District

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

September 23, 1994

Fran & Larry Collmann
9911 Anderson Mill Road
Austin, Texas 78750

Dear Mr. & Mrs. Collmann:

This responds to your letter, dated September 19, 1994, requesting this office re-evaluate the 13.942 acres located near Spicewood Springs Road and Loop 360 off White Cliff Dr., Austin, Travis County, Texas property. We have re-evaluated the new information you provided.

As stated in our letter June 1, 1994, our records indicate that golden-cheeked warblers have been sighted on the western, southern and eastern boundaries of this property. Mr. Lee Sherrod's letter to you of June 13, 1994, indicated the possibility of black-capped vireos in the area. Current information indicates the warbler and vireo are sensitive to several factors associated with residential development, including increases in noise levels, predators, human activity in nesting areas, and other disturbance factors. Therefore, we believe that clearing or development-related activities on the majority of this tract, could constitute a "take" as defined by the Endangered Species Act. The Act prohibits "take" unless it is incidental to an otherwise lawful activity and has been authorized under section 10(a)(1)(B) of the Act. We recommend that authorization under the Act be secured prior to any development.

However, we also said, there may be a possibility of building a single house on the 13.942 acres without constituting "take" if the following conditions are observed. We wish to reiterate that this property is very close to habitat that is occupied by the golden-cheeked warbler and/or black-capped vireo. To avoid harassment (a possible "take" violation) of the species that may occur in the area, we wish to recommend the following conservation measures:

1. Construction of only one single family home on the northeast portion of the property, the area which is already cleared.

2. The driveway be constructed in the already cleared roadway.

3. Exterior construction activities on this property not occur between March 1 and August 1.

4. Remove only the trees that are needed for construction of the house and septic field.

5. Use only native plants and grasses for landscaping.

6. Ensure that all clearing and construction operations are consistent with current practices of the Texas Forest Service to prevent the spread of oak wilt.

7. Prohibit the use of pesticides, herbicides and fertilizers.

If these conservation recommendations are not followed, then we believe a take could occur and recommend obtaining authorization under section 10(a)(1)(B) or section 7 of the Endangered Species Act. Section 10(a)(1)(B) permit procedures are enclosed.

Thank you for providing pertinent information to help re-evaluate this property. If you wish to discuss this matter further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

/s/ Jana Grote

Field Supervisor

Enclosure

cc: City of Austin, Conservation & Environmental Department
City of Austin, Electric Department
Jim Nuckles, Travis County Tax Appraisal District

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

January 13, 1994

Glenn Williams and Terry Wynn, Partners
P.O. Box 64138
Lubbock, Texas 79464

Gentlemen:

This letter is in reference to recent vegetation clearing activities on 611.208 acres of your property located near Spanish Pass Road and Tower Road in Kendall County, Texas. This property supports vegetation that is likely to be occupied by the federally listed endangered golden-cheeked and/or black-capped vireo.

If the development activities on the subject site are in any way disrupting the breeding and/or foraging activities of the federally protected golden-cheeked warbler and/or black-capped vireo, these activities could constitute a "take" of listed species.

The Endangered Species Act (Act) prohibits the "take" of federally-listed species unless the "take" is incidental to otherwise lawful activity and a section 10(a)(1)(B) permit under the Act has been obtained. "Take" is defined as harass, harm, pursue, hunt, shot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

We recommend that clearing activities on the property be discontinued and you contact Alma Barrera for additional

information on compliance of such activities with the Act at (512) 482-5436.

Sincerely,

/s/ Joseph E. Johnston

Field Supervisor

cc: Regional Director, Region 2
Solicitor, Department of the Interior, Tulsa, OK
Fish and Wildlife Service, Law Enforcement, San Antonio, TX

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

June 9, 1994

Stan & Donna Buck
305 Golden Oaks Drive
Georgetown, Texas 78628

Dear Mr. & Mrs. Buck:

This responds to your letter, dated March 23, 1994, requesting this office to review the following property for its suitability as habitat for federally listed threatened or endangered species:

> Lot 8, Lake Georgetown Estates II, located on County Road 262, Georgetown, Williamson County, Texas

We have reviewed the information you provided as well as other available information concerning the potential of the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates. We believe that this property would not provide suitable habitat for the black-capped vireo or the cave invertebrates, but would provide habitat for the golden-cheeked warbler.

The subject lot is part of a block of habitat occupied by the golden-cheeked warbler. Areas that are biologically necessary for the continued existence of a species may not be continuously occupied by that species. Current biological

information indicate the warbler is sensitive to several factors associated with residential development, including increases in noise levels, predators, human activity in nesting areas, and other disturbance factors. We believe that clearing or development-related activities in this area, would constitute a "take" as defined by the Endangered Species Act (Act). The Act prohibits the "take" unless it is incidental to an otherwise lawful activity and has been authorized under section 10(a)(1)(B) of the Act. We recommend that authorization under the Act be secured prior to any development. Procedures for the section 10(a)(1)(B) permit process are enclosed.

We appreciate your concern for endangered species and your desire to comply with the Endangered Species Act. This response is intended to assist you in such compliance. You are ultimately responsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional or local development requirements. If you wish to discuss this matter further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

Field Supervisor

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

September 22, 1994

Lee Sherrod
Horizon Environmental Services, Inc.
P.O. Box 162017
Austin, Texas 78716

Dear Mr. Sherrod:

This responds to your letter, dated June 28, 1994, regarding the re-evaluation of the HE Brodie tract, located Barton Creek Loop 360, Lamar and Ben White Blvd., Austin, Travis County, Texas.

Our records indicate that golden-cheeked warblers have been observed along the Barton Creek greenbelt adjacent to this property and some observations along the property line. The subject tract is part of a large tract occupied by golden-cheeked warblers. Additionally, areas that are biologically necessary for the continued existence of a species may not be continuously occupied by that species. Current biological information indicates the warbler is sensitive to several factors associated with development, including increases in noise levels, predators, human activity in nesting areas, and other disturbance factors.

We believe that clearing or development-related activities on part of this property (the water quality buffer and transition zones), could constitute a "take" as defined by the Endangered Species Act (Act). The Act prohibits "take"

unless it is incidental to an otherwise lawful activity and has been authorized under section 10(a)(1)(B) of the Act.

As discussed during our meeting of July 12, we believe some development can occur outside the City of Austin water quality buffer and transition zones, 800 feet from the middle of Barton Creek, without constituting "take" if the following conditions are observed.

1. Exterior construction activities within 1000 feet from the middle of the creek not occur between March 1 and August 1.

2. Remove only trees that are needed for construction.

3. Use only native plants and grasses for landscaping.

4. Ensure that all clearing and construction operations are consistent with current practices of the Texas Forest Service to prevent the spread of oak wilt.

If these conservation recommendations are not followed, then we believe a take could likely occur and we recommend obtaining authorization under section 10(a)(1)(B) or section 7 of the Endangered Species Act.

We appreciate your concern for endangered species and your desire to comply with the Act. If you wish to discuss this matter further, please contact Alma Barrera at (512) 482-5436.

Sincerely,

/s/ Jana Grote

Field Supervisor

Enclosure

cc: City of Austin, Environmental & Conservation Services Dept.

City of Austin, Power & Light

Jim Nuckles, Travis County Tax Appraisal District

UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
POST OFFICE BOX 1306
Albuquerque, N.M. 87103

August 19, 1992

In Reply Refer To:
Region 2/RD

Chairman John Hall
Texas Water Commission
1700 North Congress Avenue
Austin, Texas 78711

Dear Chairman Hall:

The United States Fish and Wildlife Service (Service) commends the efforts of the Texas Water Commission (TWC) to protect and ensure proper management of the limited water resources of the Edwards Aquifer (Aquifer). The TWC's proposed Water Management Plan (Plan) is a major and positive step forward by the State of Texas to resolve a long-standing water crisis that threatens public health and safety, an entire region's economy, and various ecological resources.

The Service has completed a careful review and evaluation of the TWC's proposed plan. We have determined that if the modifications outlined below are made, your plan could increase protection and assurances of flows at San Marcos and Comal Springs, and therefore could provide a sound basis for resolving endangered species issues.

You have asked the Service to provide a careful review of the TWC plan. Taking into consideration the amount of

water now present in the Aquifer, the TWC's hydrologic simulations, as well as our hydrologist's evaluation of droughts in the region, we believe that for the next 20+ years there is a high probability of uninterrupted flow at San Marcos and Comal Springs if your proposed Plan, subject to our recommended changes below, is implemented. Based on this review and incorporation of the recommended changes, the Service supports the proposed TWC Comprehensive Water Management Plan for the Edwards Aquifer.

However, our analysis indicates that even with full implementation of the Plan, there is still the possibility that some "taking" of endangered species may occur. To ensure compliance with the Endangered Species Act and address the possibility for "takings" of endangered species, we recommend that the State of Texas, or an appropriate regional management agency, apply for an incidental take permit from the Service. The Habitat Conservation Plan (HCP) that would accompany such an application should be designed to address the potential for lawful "incidental takings" of endangered species. Based on current data, the following provisions would be required as part of the HCP:

- Initially, direct pumpage from the Aquifer is to be limited, in the aggregate, to no more than 450,000 acre-feet per calendar year.

- Within 10 years, direct pumpage from the Aquifer shall be reduced by 50,000 acre-feet to 400,000 acre-feet per calendar year.

- In order to protect flows at San Marcos and Comal Springs, a special drought management plan must be developed and implemented during extreme drought. Specifically, the drought management plan must reduce direct pumpage from the Aquifer to a rate of 350,000 acre-feet per year at any

time the water level in the J-17 index well in Bexar County falls below 625 feet msl.

- TWC may allow additional withdrawals of "interruptible or (surplus) water supplies when levels at the J-17 index well are above 665 feet msl. However, such withdrawals should be limited to 88,000 acre-feet to assure that spring flows are not adversely affected during critical drought conditions. Also, allocations of such interruptible water supply should provide for the diversion of at least one-half of the water downstream of the springs and associated critical habitat areas, rather than directly from the aquifer.

- All wells used for domestic and livestock purposes should be registered with TWC, or an appropriate regional management agency, to enable the monitoring of their cumulative impact on the Aquifer.

- Maintain moratorium on new wells until the State or local rules go into effect.

- The section 10(a) permit length would be 20 years or less.

Also, from the review we've conducted, it is clear that there is a relationship between pumpage from the Aquifer and flows at San Marcos and Comal Springs. Maintenance of springflows are clearly enhanced as direct pumpage from the Aquifer is reduced. Consequently, the Service recommends a study be conducted over the next 5 years to determine the feasibility of various water users diverting 50,000 to 75,000 acre-feet of their Aquifer water withdrawals from some point downstream of the springs and critical habitat areas.

We also encourage other Federal agencies to demonstrate a leadership role in water conservation and the protection of endangered species. The Endangered Species Act (ESA) states ". . . that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act." This requirement applies to all Federal agencies which contribute, directly or indirectly, to the withdrawal of water from the Edwards Aquifer. The Department of Defense, Department of Agriculture, Department of Transportation, Environmental Protection Agency, and Department of Housing and Urban Development are examples of Federal entities that must play a vital role in the protection of endangered species that are dependent upon the Edwards Aquifer.

Again, the Service supports your efforts and believes that the sensitive springs systems will be afforded a significantly higher degree of protection than they now have. We are very excited and encouraged by the progress that you and your colleagues have made toward developing a much needed and long overdue management plan for the Edwards Aquifer. I particularly appreciate your efforts to look at the "big picture" and provide a plan that considers invaluable natural resources such as springflows, instream flows, and flows to the bays and estuaries, as well as consideration for human well-being. We look forward to continuing our work with you in this endeavor to protect the unique ecosystems that depend on the waters of the Edwards Aquifer.

Sincerely,

s/ Michael Spear

Regional Director

Enclosures

cc:

U.S. Senator Lloyd Bentsen
U.S. Senator Phil Gramm
Honorable Henry B. Gonzalez
Honorable Lamar S. Smith
Honorable Albert G. Bustamante
Governor Ann Richards
Sam Hamilton, State Administrator, FWS, Austin, TX
Andrew Sansom, Executive Director, Texas Parks & Wildlife Dept., Austin, TX

SIERRA CLUB LONE STAR CHAPTER

April 15, 1994

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

TO: The Honorable Bruce Babbitt, Secretary
United States Department of the Interior
Office of the Secretary
18th and C Streets, N.W.
Mail Slot #MS6217
Washington, D.C. 20240

All Federal agencies listed on Exhibit A attached to this notice

The City of San Antonio and other individuals and entities that withdraw water from the Edwards Aquifer, some of whom are listed on Exhibit B

The Texas Natural Resource Conservation Commission (TNRCC)

All other Violators (Defined Below)

Re: Notice of Endangered Species Act Violations

Dear Secretary Babbitt, all Federal agencies listed on Exhibit A attached to this notice, the City of San Antonio and other individuals and entities that withdraw water from the Edwards Aquifer including, without limitation, those listed on Exhibit B, the TNRCC, and all other violators:

We am writing on behalf of the Sierra Club and Clark Hubbs to notify each of you, pursuant to Section 11(g)(2)(A)(i) of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1540(g)(2)(A)(i), of violations of the ESA, 16

U.S.C. 1531 et seq., by each of you, and of the Sierra Clubs and Clark Hubbs intent to sue concerning these violations.

Unlawful actions and failures or refusals to act by all of you cause severe overdrafting of the Edwards Underground River, also known as the Edwards (Balcones Fault Zone) Aquifer, San Antonio Region, hereinafter, the Edwards. Overdrafting of the Edwards poses a substantial and imminent threat of jeopardy to the continued existence of endangered and threatened species and to the public health and safety of 1.5 million people. Both the species and the people are dependent on clear, clean natural Edwards water. Overdrafting of the Edwards moves hydrogen sulfide, a hazardous substance, into the fresh water in the Edwards. Overdrafting of the Edwards threatens to poison the Edwards for everyone.

This threat is urgent. Overdrafting has already resulted in takings of endangered species in 1989 and 1990, and according to the largest pumper, San Antonio, threatens to do so again this summer and in 1995 and 1996. Overdrafting has already resulted in jeopardy to endangered species at Comal Springs in 1989 and 1990, and according to San Antonio threatens to do so again in mid-1995 and mid-1996. Overdrafting has already resulted in some movement of bad water, contaminated by hydrogen sulfide, a hazardous substance, in 1956. It threatens to do so again in a repeat of the drought of record, or in a drought less serious than the drought of record but slightly more serious than the droughts of 1984, 1989 and 1990.

This threat requires a vigorous coordinated federal-state-local response, beginning immediately. Michael Spear, Assistant Director of the U.S. Fish & Wildlife Service (USFWS), lead agency in charge of the Edwards species, testified in November 1992 that the Texas legislative session ending May 1993 represented the last chance for a state solution, before the blunt axes of ESA 7 and 9 have to be dropped. That legislative session produced a statute, S.B.

1477 which, according to the State of Texas, is frozen. No federal, state or local entity has a plan adequate to protect endangered species and human water supplies against overdrafting of the Edwards. The States last plan does not come close to protecting these waters, according to an independent mid-1993 review by the University of Texas.

The background facts are set forth in the Findings of Fact and Conclusions of Law entered on February 1, 1993, by the Honorable Lucius Bunton, Senior United States District Judge, in Sierra Club v. Lujan, 1993 WL 151353 (W.D. Tex.), as amended May 26, 1993, appeal dismissed sub. nom. Sierra Club v. Babbitt, 995 F.2d 571 (5th Cir. 1993). A copy is attached as Exhibit C and incorporated by reference in this notice of violation.

The Sierra Club and Clark Hubbs hereby give notice of the following violations:

(1) The Secretary of the Interior and the U.S. Fish & Wildlife Service have violated and are violating ESA 4, 16 U.S.C. 1533, by (a) failure to act on the listing petitions for certain Comal Springs species; (b) failure to designate critical habitat for those species and for the Texas blind salamander; (c) failure to develop recovery plans for the Comal Springs species and/or population and for the Texas blind salamander; (d) failure to implement key provisions of the San Marcos Recovery Plan; and (e) failure to promulgate regulations to protect threatened species against reduction in springflows due to excessive pumping of the Edwards.

(2) The Secretary of the Interior and all Federal Agencies listed on Exhibit A (together, the Federal Violators), including but not limited to the U.S. Fish and Wildlife Service, the U.S. Departments of the Interior, Transportation, Agriculture, Defense, Army and Air Force, the U.S. Defense Base Closure and Realignment Commission, and the Agency for Toxic Substances and Disease Registry, have violated and are violating ESA 7, 16

U.S.C. 1536, by failing to review and utilize their authorities to plan and carry out programs for the conservation of the Edwards, Comal and San Marcos species against reduced springflows due to excessive pumping and by failing to engage in coordinated multi-agency consultation to insure that no actions or activities authorized, funded or carried out by them or by other federal agencies are likely to jeopardize the continued existence of any of the Edwards, Comal and San Marcos species.

(3) The Federal Violators, the TNRCC, and the City of San Antonio and other individuals and entities who withdraw water from the Edwards Aquifer, some of whom are listed on Exhibit B, have violated and are violating ESA 9 by authorizing, funding or carrying out pumping, or by authorizing, funding or carrying out activities that allow, maintain, encourage or increase pumping, from the Edwards to an extent that reduces Edwards levels and Comal and San Marcos springflow rates to below the points at which endangered wildlife are actually killed or injured.

The Sierra Club and Clark Hubbs intend to amend and supplement the Sierra Clubs complaint in Sierra Club v. Babbitt, seeking leave from Judge Bunton for this purpose. The Sierra Club and Clark Hubbs intend to allege violations of ESA Sections 4, 7 and 9 and of other federal statutes, against specific defendants, as set forth in the proposed amended and supplemental complaint, a copy of which is attached as Exhibit D, and incorporated by reference in this notice of violation. The Sierra Club and Clark Hubbs reserve the right to sue others to whom this notice of violation is sent for the violations covered by this notice, in the proposed amended and supplemental complaint or in a future amended and supplemental complaint. In particular, the Sierra Club and Clark Hubbs give notice that they intend, as necessary, to sue pumpers for violations of ESA Section 9 and seek injunctive relief restricting pumping to prevent violations of Section 9. Such relief may be requested as early as this summer.

Excessive pumping jeopardizes both endangered species and San Antonio's and others water supply. In summary, federal, state and local authorities have the power and duty to protect the Edwards against excessive pumping. They have failed and are failing or refusing to carry out their responsibilities. As a result, excessive pumping by San Antonio, the San Antonio military bases, agribusinesses and others imperils the Edwards ecosystem.

The Sierra Club and Clark Hubbs plan to take prompt legal action to obtain judicial remedies for this emergency.

Sincerely,

Ken Kramer, Director
Lone Star Chapter of the
Sierra Club

Stuart Henry
SBN 09484000
202 West 17th Street
Austin, Texas 78701
(512) 479-8125
(512) 479-8269 (fax)

P.M. Schenkkan
SBN 17741500
727 E 26th Street
Austin, Texas 78705
(512) 471-3280
(512) 471-6988 (fax)

Attachments

cc: Governor Ann Richards
TO: Bruce Babbitt, et al.
April 15, 1994
Page PAGE 4

1. U.S. Agency for Toxic Substances and Disease Registry
   By serving David Satcher, Administrator
   1600 Clifton Road, N.E.
   Atlanta, GA 30333

2. U.S. Defense Base Closure and Realignment Commission
   By serving James A. Courter, Chairman
   Rosslyn Metro Center Bldg.
   1700 North Moore Street
   Arlington, VA 22209

3. U.S. Department of Agriculture
   By serving Mike Espey, Secretary
   14th and Independence Avenue, S.W.
   Washington, D.C. 20250

4. U.S. Department of Commerce
   By serving Ronald H. Brown, Sr., Secretary
   14th St. and Constitution Avenue, N.W.
   Washington, D.C. 20230

5. U.S. Department of Defense
   By serving William J. Perry, Secretary
   The Pentagon
   Washington, D.C. 20301

6. U.S. Department of the Air Force
   By serving Sheila E. Widnall, Secretary of the Air Force
   The Pentagon
   Washington, D.C. 20330

7. U.S. Department of the Army
   By serving Togo D. West, Jr., Secretary of the Army
   The Pentagon
   Washington, D.C. 20310

8. U.S. Department of the Navy
   By serving John H. Dalton, Secretary of the Navy
   The Pentagon
   Washington, D.C. 20350

9. U.S. Department of Education
By serving Richard W. Riley, Secretary
400 Maryland Avenue, S.W.
Washington, D.C. 20202

10. U.S. Department of Energy
By serving Hazel R. O'Leary, Secretary
Forrestal Building
1000 Independence Avenue, S.W.
Washington, D.C. 20585

11. U.S. Department of Health and Human Services
By serving Donna E. Shalala, Secretary
200 Independence Avenue, S.W.
Washington, D.C. 20201

12. U.S. Department of Housing and Urban Development
By serving Henry G. Cisneros, Secretary
451 Seventh Street, S.W.
Washington, D.C. 20410

13. U.S. Department of the Interior
By serving Bruce Babbitt, Secretary
18th and C Street, N.W.
Mail Slot # MS6217
Washington, D.C. 20240

14. U.S. Department of Justice
By serving Janet Reno, Attorney General
Tenth Street and Constitution Avenue, N.W.
Washington, D.C. 20530

15. U.S. Department of Labor
By serving Robert B. Reich, Secretary
200 Constitution Avenue, N.W.
Washington, D.C. 20210

16. U.S. Department of State
By serving Warren Christopher, Secretary
2201 C Street, N.W.
Washington, D.C. 20520

17. U.S. Department of Transportation

By serving Federico F. Pena, Secretary
400 Seventh Street, S.W.
Washington, D.C. 20590

18. U.S. Department of the Treasury
By serving Lloyd M. Bentsen, Secretary
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

19. U.S. Department of Veteran Affairs
By serving Jesse Brown, Secretary
810 Vermont Avenue, N.W.
Washington, D.C. 20420

20. Environmental Protection Agency
By serving Carol M. Browner, Administrator
401 M Street, S.W.
Washington, D.C. 20460

21. Farm Credit Administration
By serving Billy R. Brown, Chairman
1501 Farm Credit Drive
McLean, VA 22102

22. Farmers Home Administration
By serving Michael V. Dunn, Administrator
14th Street and Independence Avenue, S.W.
Washington, D.C. 20250

23. Federal Communications Commission
By serving Reed E. Hundt, Chairman
1919 M Street, N.W.
Washington, D.C. 20554

24. Federal Deposit Insurance Corporation
By serving Andrew Hove, Chairman
550 Seventeenth Street, N.W.
Washington, D.C. 20429

25. Federal Emergency Management Agency
By serving James Lee Witt, Director
Federal Center Plaza
500 C Street, S.W.
Washington, D.C. 20472

26. Federal Home Loan Mortgage Corporation
By serving Leland C. Brendsel, Chairman
8200 Jones Branch Drive
McLean, VA 22102

27. Federal Housing Finance Board
By serving the Chairman
1777 F Street, N.W.
Washington, D.C. 20006

28. Federal Labor Relations Authority
By serving Jean McKee, Chairman
607 Fourteenth Street, N.W.
Washington, D.C. 20424-0001

29. Federal Trade Commission
By serving Janet D. Steiger, Chairman
Sixth Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

30. General Services Administration
By serving Roger W. Johnson, Acting Administrator
18th and F Streets, N.W.
Washington, D.C. 20405

31. International Development Cooperation Agency of the United States
By serving J. Brian Atwood, Director
Department of State Building
320 Twenty-first Street, N.W.
Washington, D.C. 20523

32. International Trade Commission
By serving Don E. Newquist, Chairman
500 E Street, S.W.
Washington, D.C. 20436

33. Interstate Commerce Commission
By serving Gail C. MacDonald, Chairman
Twelfth Street and Constitution, N.W.
Washington, D.C. 20423

34. National Labor Relations Board

By serving James M. Stephens, Chairman
1099 14th Street, N.W.
Washington, D.C.
20570

35. Office of Thrift Supervision
By serving Jonathon L. Fiechter, Acting Director
1700 G Street, N.W.
Washington, D.C.
20552

36. U.S. Postal Service
By serving Marvin Runyon, Postmaster General
475 L'Efant Plaza West, S.W.
Washington, D.C.
20260

37. Resolution Trust Corporation Oversight Board
By serving Jack Ryan, Chief Executive Officer
801 17th Street, N.W.
Washington, D.C.
20434

38. Securities and Exchange Commission
By serving Arthur Levitt, Jr., Chairman
450 Fifth Street, N.W.
Washington, D.C.
20549

39. Selective Service System
By serving Robert W. Gambino, Director
1515 Wilson Boulevard
Arlington, VA 22209-2425

40. Small Business Administration
By serving Erskine Bawles, Administrator
409 Third Street, S.W.
Washington, D.C.
20416